Supreme Court, U.S.
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No. 02-680

IN THE

Supreme Court of the United States

PATRICK C. ENGLISH and THE BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE TOWN OF BOONTON and WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT THE BOARD OF EDUCATION OF THE TOWN OF BOONTON

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REASONS FOR DENYING THE PETITION

Petitioners pretend that certiorari is necessary to "reconcile" the holdings of *Hadley v. Junior College District*, 397 U.S. 50 (1970), and *Holt v. City of Tuscoloosa*, 439 U.S. 60 (1978), and "clarify" whether the "one person, one vote" doctrine is violated when residents of one town that pays another to educate its high school students are denied the right to vote for the board of education of that other town. In truth, *Hadley* is inapposite, and *Holt* so clearly answers Petitioners' question in the negative that the Third Circuit unanimously directed the entry of summary judgment against Petitioners. In doing so, the Circuit reversed the patently erroneous judgment of the District Court, whose opinions nowhere so much as mention either *Holt* or the settled, and in this case determinative, principle that the one person, one vote doctrine does not apply across two separate voting jurisdictions. Nor is there any conflict among the Circuits: The Third Circuit's decision accords with that of the only other Circuit that has addressed the issues here presented. *See Mixon v. State of Ohio*, 193 F.3d 389, 404-05 (6th Cir. 1999). Under these circumstances, there is no reason to grant certiorari.

I.

THE THIRD CIRCUIT'S DECISION WAS A STRAIGHTFORWARD APPLICATION OF THE PRINCIPLES STATED IN *HOLT*

In *Holt*, this Court recognized that: (1) a voting district "may legitimately restrict the right to participate in its political processes to those who reside within its borders," even when its decisions have a "dramatic" effect upon non-residents (439 U.S. at 68-70); and (2) only where a voting district is "exercising precisely the same governmental powers over [non-residents] as it does over those residing within its [borders]" may disenfranchisement of the non-residents implicate the one person, one vote principle (439 U.S. at 72 n.8).

Applying these principles (*see* Pet. App. at 15a-20a), the Third Circuit concluded that in this case "the residents of Lincoln Park have no right to vote in the election of Boonton's School Board." The Circuit explained, in part, as follows:

> This is not a case in which the Boonton Board "exercis[es] precisely the same governmental powers over residents of [Lincoln Park] as it does over those residing within its [district's] limits." *Id. at 72 n. 8.* Lincoln Park residents are subject to the extraterritorial powers of the Boonton Board only with respect to their high school-aged children. For matters concerning K-8 education, the residents of Lincoln Park exercise exclusive control through their own school board elected solely by Lincoln Park residents. Moreover, the Boonton Board's control over high school

> education is only one of its many responsibilities affecting the residents of Boonton. The Board is also responsible for the district's K-8 educational program, as well as matters that affect the district as a whole, such as school facilities and the district's central administrative staff.
>
> . . . . [W]e think that the extraterritorial power over education exercised by the Boonton Board is itself "limited" for the reasons described above: the Boonton Board controls only four of the thirteen years of a Lincoln Park child's education and Lincoln Park possesses its own school board elected exclusively by Lincoln Park residents for the governance of K-8 affairs. Moreover, Lincoln Park residents are not without any voice in the governance of Boonton High, for state law, as explained above, entitles the Lincoln Park Board to appoint a representative to the Boonton Board. That person may speak at Board meetings to convey Lincoln Park's view. He or she also has a vote on matters that primarily affect the high school. *See* N.J.S.A. § 18A:38-8.1.

Pet. App. at 20a-22a.

As the Third Circuit's opinion was but an unremarkable application of the principles enunciated in *Holt*, certiorari is unwarranted.

II.

HOLT RESOLVED AGAINST PETITIONERS EACH OF THE GROUNDS ON WHICH THEY SEEK CERTIORARI

A. *Holt* Held That Cases Such as *Hadley*, Which Concern the Voting Rights of Residents of the Voting District In Question, Are Inapposite to Cases Like This One, Which Concerns the Voting Rights Of Non-Residents

Petitioners overlook a critical distinction between *Hadley* and this case: While Petitioners are non-residents of Boonton, the plaintiffs in *Hadley* were residents of the voting district in question. *See Hadley*, 397 U.S. at 51-52 ("[We] hold that the Fourteenth Amendment requires that the trustees of this junior college district be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, *as that of any other voter in the junior college district*.") (emphasis added).[1]

1. *Hadley* involved a junior college district comprised of eight otherwise separate school districts that had, pursuant to the applicable Missouri law, expressly and voluntarily combined, by a vote of the residents of each constituent district, to form the junior college district. While New Jersey law also provides for the formation of combined or "regional" school districts, it clearly distinguishes between such a regional district and a sending-receiving relationship, such as exists between Boonton and Lincoln Park. As the court explained in *Borough of Sea Bright v. State Department of Education*, 242 N.J. Super. 225, 232-233 (App. Div.), *cert. denied*, 127 N.J. 320 (1990): "A regional school district is a single political entity for the purpose of providing educational services to residents of its constituent municipalities . . . whereas *sending and receiving districts remain distinct political entities* which enter contracts for educational

(Cont'd)

The *Holt* majority unequivocally declared cases such as *Hadley* — which predated, and was cited by the dissenters in, *Holt* (439 U.S. at 81 (dissenting opinion of Justice Brennan)) — inapposite to cases which, like this one, concern the voting rights of *non-residents* of the voting district in question:

> No decision of this Court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized

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services under the supervision of the Commissioner of Education." *Id.* (emphasis added). It is equally clear that the relationship between Boonton and Lincoln Park is *not* a "regional" school district: Under New Jersey law, a vote by the citizens of each constituent school district is a prerequisite to the formation between those districts of a regional school district (N.J.S.A. 18A:13-5), and it is undisputed that Boonton and Lincoln Park never intended or agreed, much less voted, to form a regional school district. *See also Holt*, 439 U.S. at 71 (reaffirming "the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them."). Further, Lincoln Park's right to proportionate representation on a regional board of education would have been accompanied by substantial financial obligations that Lincoln Park avoids in its sending-receiving relationship with Boonton. Perhaps most notably, while in the sending-receiving relationship Lincoln Park has no responsibility for the principle amounts of capital expenditures, which are born solely by Boonton, as a participant in a regional school district, Lincoln Park would be liable for its proportionate share of those amounts. *Compare* N.J.S.A. 18A:13-23 (concerning apportionment of appropriations among regional school districts) *with* N.J.A.C. 6A:23-3.1(e)(6) (concerning "building use charges" billable by a receiving district to a sending district as "tuition").

> that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.

Id., 439 U.S. at 68-69.[2]

2. *Township of Marlboro v. Board of Education of Freehold Regional High School*, 9 F. Supp. 2d 500 (D.N.J. 1998), and *Township of Marlboro v. Board of Education of Freehold Regional High School*, 992 F. Supp. 756 (D.N.J. 1998) (discussed in Pet. at 13-14), which, like *Hadley*, involved the voting rights of *residents* of a regional school district, are distinguishable from this case on the same grounds as is *Hadley*. Accordingly, Petitioner's assertion that "[w]hile not directly overruling *Township of Marlboro*, the Third Circuit's decision in the case at hand certainly casts doubt on its legal underpinnings" (Pet. at 14 n.3), is plainly untrue: It bears repeating that the Third Circuit's decision in this case turns on the fact that English, like the other residents of Lincoln Park, is a *non-resident* of Boonton, the voting district here at issue. As *Marlboro* involved only the rights of *residents* of the regional school district there at issue, its holding is unaffected by the Third Circuit's decision here.

Similarly distinguishable are the reapportionment cases cited by Petitioners in support of their contention that this Court should simply ignore the geographic/political boundaries between Boonton and Lincoln Park (Pet. at 12-13): In each of those cases, the plaintiffs who complained that state apportionment statutes diluted their votes in state elections were *residents* of the state in question. *Reynolds v. Sims*, 377 U.S. 533, 568, 577 (1964) ("[A]n individual's right to vote *for state legislators* is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens *living in other parts of the State*.") (emphasis added); *Baker v. Carr*, 369 U.S. 186, 187-88, 192-93 (1962) (holding justiciable and subject to the jurisdiction of the district court the claim that a Tennessee statute apportioning state legislators by county

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violated equal protection by arbitrarily "debasing" the votes of some Tennessee residents verses others); *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963) (holding that in *statewide* elections, each person's vote must be counted equally with those of all other voters "in his state").

The other cases Petitioners cite in support of their contention that this Court should ignore the geographic/political boundaries between Boonton and Lincoln Park (Pet. at 12-13) expressed a willingness to consider overriding such boundaries *not* because such boundaries are to be lightly disregarded, as Petitioners insinuate, but only because, and to the extent that, the particular boundaries at issue were established *with the purpose or effect of fostering racial segregation* — a wrong never even suggested in this case, much less pled or proven. *See Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (*cited in* Pet. at 12) (Class action brought by parents, children, and others against various state and school district officials seeking relief from alleged illegal racial segregation in the Detroit public school system: "Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country."); *Haney v. County Board of Education of Sevier County*, 410 F.2d 920, 926 (8th Cir. 1969) (*cited in* Pet. at 12-13) ("We find as a matter of law that the school district lines of Sevier County were created to reflect racial separation by schools."); *Jenkins v. Township of Morris School Dist.*, 58 N.J. 483, 500-01 (1971) (*cited in* Pet. at 13) (While governmental subdivisions of the state "may readily be bridged *when necessary to vindicate state constitutional rights . . . [t]his does not entail any general departure from the historic home rule principles and practices in our State in the field of education* . . . [T]he State Commissioner must have power to cross district lines *to avoid 'segregation in fact.'*"). While the Courts have expressed willingness to override racially discriminatory geographic/

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As *Hadley* did not involve the voting rights of non-residents, it did not address at all the question presented here and in *Holt* — the inapplicability of the one person, one vote principle to *non-residents* of the voting district in question. Rather, the question in *Hadley* was whether the powers of the trustees of the Junior College District — the election of whom was at issue — were "general enough and ha[d] sufficient impact throughout the district" to justify application of the one person, one vote principle *as between residents of that district*. *Hadley*, 397 U.S. at 53-54. Thus, while petitioners make much of this Court's comment in *Hadley* that "[e]ducation has traditionally been a vital governmental function," it is clear from the context that the Court intended merely to distinguish the election of the educational officials there at issue from elections of "certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with [the one person, one vote principle] might not be required." *Hadley*, 397 U.S. at 56.

(Cont'd)

political boundaries between school districts in order to remedy racial segregation — a blatant constitutional wrong — *Holt* plainly holds that, except in circumstances that are absent here, withholding the franchise from *non-residents* of the voting district in question — the only "misconduct" here alleged — is not a constitutional wrong at all. *Milliken* and *Jenkins* confirm that, because disregard of the geographic/political boundaries between Boonton and Lincoln Park is *not* necessary to remedy racial discrimination or any other constitutional wrong, the Court of Appeals was obligated to respect those boundaries. *See Milliken*, 418 U.S. at 741-42; *Jenkins*, 58 N.J. at 500-01.

Under these circumstances, Petitioner's logical leap — from *Hadley*'s reference to education as a "vital governmental function" to the conclusion that *Holt*'s nearly complete refusal to apply the one person, one vote principle to *non-residents* is simply overridden in cases involving education — is untenable. Accordingly, the Court of Appeals correctly "doubt[ed] the viability of" Petitioners' attempt to distinguish *Holt* from this case on the ground that "this case concerns education, 'a vital governmental function,' *Hadley*, 397 U.S. at 56." Pet. App. 21a. *Accord Mixon v. State of Ohio*, 193 F.3d 389, 404-05 (6th Cir. 1999) (Ohio statute empowering Cleveland's Mayor to appoint school board for Cleveland School District — which extends beyond Cleveland's city limits — does not violate the "one person, one vote principle" notwithstanding that those who live within the School District, but outside the City, cannot vote for Cleveland's Mayor); *Hawkins v. Johanns*, 88 F. Supp. 2d 1027, 1044 (D. Neb. 2000) (Nebraska statutes requiring "elementary only" school districts to affiliate with "K-12" school districts for the provision of post-elementary education did not violate equal protection even though voters in the elementary only district were not entitled to vote for the school board that ran the affiliated K-12 district, because, although "affiliated," the elementary and K-12 districts remained separate, geographically distinct, voting districts.).[3]

3. Equally untenable is Petitioners' attempt to bootstrap a constitutional right to proportionate representation on Boonton's Board of Education from Lincoln Park's right to have one voting member on that Board pursuant to N.J.S.A. 18A:38-8.2(a)(2)). Pet. at 14 ("As the Board of Education of the Town of Boonton has Lincoln Park representation on it, albeit woefully disproportionate, Judge Hochberg was not applying the principle of 'one person, one vote' across geographical/political boundaries of its current and existing authority."). (Cont'd)

B. *Holt* Belies Petitioners' Attempt to Equate this Case to *Little Thunder* and *Evans*

In attempting to distinguish *Holt*, Petitioners implausibly equate this case to: (1) *Little Thunder v. South Dakota*, 518

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The argument is entirely fallacious. First, N.J.S.A. 18A:38-8.1 and 8.2, enacted to "provide the sending district with *a voice* on the receiving district board of education" (Governor's Recommendations to Senate Bill No. 151 (Second Reprint), October 20, 1994 (emphasis added)), make clear that the single representative on Boonton's Board of Education allotted to Lincoln Park as a sending district *is not an elected position*; rather that representative is *designated by the sending district's board of education*. *See* N.J.S.A. 18A:38-8.2(d) ("[a] representative of a sending district board of education *shall be designated at [a] meeting of the board*") (emphasis added). The fact that Lincoln Park's representative on the Boonton Board is a non-elective office precludes Petitioners' argument, because it is well settled that the one person, one vote doctrine is completely inapplicable to non-elective offices. *See, e.g., Hoots v. Commonwealth of Pennsylvania*, 672 F.2d 1124, 1130 (3d Cir. 1982) (*Sailors v. Board of Education*, 387 U.S. 105 (1967) "address[ed] the question whether the principle of proportional representation has any bearing on non-elective offices, and held that it does not.").

Further, insofar as Petitioners' argument confuses the extraterritorial scope of the Boonton Board's "authority" with Boonton's "geographic/ political boundaries," it is precluded both by the New Jersey caselaw holding that "sending and receiving districts remain distinct political entities" (*Borough of Sea Bright*, 242 N.J. Super. at 232-233 (emphasis added)), and by this Court's rejection of the argument of the non-resident appellants in *Holt* that "extraterritorial extension of municipal powers requires concomitant extraterritorial extension of the franchise." *Holt*, 439 U.S. at 69-70 ("The line heretofore marked by this Court's voting qualifications decisions coincides with the geographical boundary of the governmental unit at issue, and we hold that appellants' case, like their homes, falls on the farther side.").

F.2d 1253 (8th Cir. 1975), in which "a city ha[d] annexed outlying territory in all but name, and [wa]s exercising precisely the same governmental functions over residents of surrounding unincorporated territory as it d[id] over those residing within its corporate limits,"[4] and (2) *Evans v. Cornman*, 398 U.S. 419, 423, 424, 426 (1970)), in which persons living on the grounds of the National Institutes of Health, a federal enclave located within the geographical boundaries of Maryland, were denied the right to vote as Maryland residents in federal, state, and local elections, notwithstanding that they "were subject to such 'important aspects of state powers' as Maryland's authority 'to levy and collect [its] income, gasoline, sales, and use taxes,'" and "were just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as their neighbors who live off the enclave."[5] Pet. at 11a-12a.

It is patent, however, that Lincoln Park bears no resemblance to the disenfranchised territories to which Petitioners equate it. Unlike those territories, Lincoln Park is an independent town, with its own separate, fully functioning municipal government — including its own separate board of education — elected solely by Lincoln Park's own residents. Indeed, the *only* relationship between Boonton and Lincoln Park is the sending-

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4. *See Holt*, 439 U.S. at 72 n.8 (discussing *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975)).

5. *See Holt*, 439 U.S. at 71, 72 nn.7 and 8 (discussing *Evans v. Cornman*, 398 U.S. 419, 423, 424, 426 (1970)); *see also id.* at 71 n.7 ("Treatment of the plaintiffs in *Evans* as nonresidents of Maryland had repercussions not merely with respect to their right to vote in city elections, but with respect to their right to vote in national, state, school board, and referendum elections.").

receiving relationship between them with respect to Lincoln Park's high school students.[6]

Under these circumstances, English's attempt to distinguish *Holt* on the basis of *Evans* and *Little Thunder* must fail. In *Holt* this Court found that, because the disenfranchised non-residents of Tuscaloosa had neither alleged nor shown "that the authority exercised by the city of Tuscaloosa within the police jurisdiction is *no less than*

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6. Significantly, that relationship is the result of the *voluntary choice made by Lincoln Park's own elected Board of Education* over fifty years ago and continually reaffirmed by it thereafter — most recently in its brief as intervener in before the Court of Appeals — to educate its high school students at Boonton High School through a sending-receiving relationship, thereby avoiding the substantial capital expenses of building its own high school or of participating in a regional school district. *See* Brief of the Intervenor, Board of Education of Lincoln Park, In Opposition to the Appeal of the Board of Education of the Town of Boonton and David Hespe, The New Jersey Commissioner of Education ("Lincoln Park Brief on Appeal") at 4 ("Boonton correctly points out that Lincoln Park has never advised that it wants to sever the relationship with Boonton. Nor would Lincoln Park be interested in severing the relationship with Boonton."). Were English or other Lincoln Park residents dissatisfied with that relationship, they could elect to the *Lincoln Park* Board of Education members who would seek severance of Lincoln Park's sending-receiving relationship with Boonton pursuant to New Jersey law, as the Boonton Board is now in the process of doing. *See* Boonton's Supplemental Appendix on Appeal at 1 (formal resolution of the Boonton Board of Education authorizing application to the New Jersey Commissioner of Education for permission to sever its sending-receiving relationship with Lincoln Park). *Cf. Holt*, 439 U.S. at 77 (concurring opinion of Justice Stevens) ("Unlike the [appellants] in *Evans* . . . appellants are not without any voice in the election of the officials who govern their affairs . . . *[T]hrough their state representatives, they participate directly in the process which has created their governmental relationship with the city.*") (emphasis added).

that exercised by the city within its corporate limits," the one person, one vote doctrine was inapplicable. *Holt*, 439 U.S. at 72 n.8. Significantly, the Court made clear that, in determining whether the extraterritorial authority exercised is "no less than" the authority exercised over residents, the extraterritorial powers are to be compared to *all* of the governmental powers that the jurisdiction exercises over its own residents. Thus, in finding the one person, one vote principle inapplicable, the Court stated as follows:

> The minute catalog of ordinances of the city of Tuscaloosa which have extraterritorial effect set forth by our dissenting Brethren, *post*, at 396, n. 10, is as notable for what it does not include as for what it does. While the burden was on appellants to establish a difference in treatment violative of the Equal Protection Clause, we are bound to observe that among the powers *not* included in the "addendum" to appellants' brief referred to by the dissent are the vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses.

Id. (emphasis in original); *accord id.*, 439 U.S. at 76 (concurring opinion of Justice Stevens) ("appellants have shown no more than that they . . . are subject to some — but by no means all — of the regulations and services afforded by the cities to their residents. . . . Such a showing is plainly insufficient to justify a holding that the Alabama statutes are unconstitutional.")

Here, even more clearly than in *Holt*, Petitioners failed to meet their burden of showing that the extraterritorial authority

Boonton exercises over English and other Lincoln Park residents is "no less than" that which Boonton exercises over its own residents. Like the non-resident appellants in *Holt*, Petitioners failed to allege or show that Boonton exercises over Lincoln Park "the vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, [or] zone property for various types of uses." *See id.* Petitioners also failed to allege or show that Boonton exercises over English and other Lincoln Park residents any of the powers that Tuscaloosa *did* exercise over the non-resident appellants in *Holt*, to wit, police and sanitary regulations, criminal court jurisdiction, and licensing of businesses, trades, and professions. *Id.*, 439 U.S. at 61-62, 72 n.8.[7]

Further, as the Third Circuit stressed, even limiting the inquiry to Boonton's authority over education, the extraterritorial

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7. While petitioners argue that by virtue of the sending-receiving relationship Boonton has the power to "tax" Lincoln Park residents (Petition at 11-12), that is simply untrue. In fact, the governing New Jersey statute provides that the tuition Boonton receives for educating Lincoln Park's students is paid as follows:

> such tuition shall be paid by the custodian of school moneys of the sending district out of any moneys in his hands available for current expenses of the district upon order issued by the board of education of the sending district, signed by its president and secretary, in favor of the custodian of school moneys of the receiving district.

N.J.S.A. 18A:38-19.

Accordingly, despite the sending-receiving relationship, Boonton has no more power to "tax" English or the other residents of Lincoln Park than does any vendor who gets paid by the town for supplying it with goods or services.

authority Boonton exercises over English and other Lincoln Park residents is plainly far less than the authority it exercises over Boonton residents:

> [While] Lincoln Park residents are subject to the extraterritorial powers of the Boonton Board only with respect to their high school-aged children . . . the Boonton Board's control over high school education is only one of its many responsibilities affecting the residents of Boonton. The Board is also responsible for the [Boonton] district's K-8 educational program, as well as matters that affect the district as a whole, such as school facilities and the district's central administrative staff.

Pet. App. at 20a-21a.

Under these circumstances, Petitioners clearly failed to meet their burden of showing that the extraterritorial powers Boonton exercises over English and the other residents of Lincoln Park are "no less than" those that Boonton exercises over its own residents. *Holt*, 439 U.S. at 72 n.8. Accordingly, the Third Circuit correctly held that, because this is not a case in which the Boonton "exercis[es] precisely the same governmental powers over residents of [Lincoln Park] as it does over those residing within its [district's] limits," the one person, one vote principle is inapplicable, and "the residents of Lincoln Park have no right to vote in the election of Boonton's School Board." 20a-21a, 25a.[8]

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8. While Justice Stevens mentioned in his concurring opinion in *Holt* that "Tuscaloosa, *for example*, does not tax the residents of Holt, nor does it control the zoning of their property or the operation of their schools" (*id.* at 77 (emphasis added)), he never suggested

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III.

MISSTATEMENTS OF LAW AND FACT IN THE PETITION

In addition to the previously mentioned misstatements of law and of fact contained in the Petition, we point out, pursuant to Rule 15(2) of this Court, the following:

1. While Petitioners' assert that *The Board of Education of the Township of Branchburg, et al. v. David Livingston, Somerset County Superintendent, et al.*, Civil. No. 98-557

(Cont'd)

that the *Holt* decision "does not apply to important aspects of state power such as school governance," as Petitioners contend. Pet. 11a (*citing Holt*, 439 U.S. at 76). On the contrary, Justice Stevens: (1) stated unequivocally that he "join[ed] the opinion of the Court" (*id.*); and (2) expressly agreed with the majority's rationale for holding that the non-residents in *Holt* had no constitutional right to vote in Tuscaloosa's elections. As Justice Stevens put it,

> appellants have shown no more than that *they . . . are subject to some — but by no means all — of the regulations and services afforded by the cities to their residents*, in return for which they pay license fees half as great as those paid by city residents. *Such a showing is plainly insufficient to justify a holding that the Alabama statutes are unconstitutional. . . .*

Id. at 78 (emphasis added); *see also id.* at 76 (where Justice Stevens observed that "[c]ertainly there is nothing in the Federal Constitution to prevent a suburb from contracting with a nearby city to provide municipal services for its residents, even though those residents have no voice in the election of the city's officials or in the formulation of the city's rules.").

(AET) and 99-822 (consol.) is a "related case" (Pet. at 1), in fact, it has been neither designated nor processed as such by either the District Court or the Court of Appeals. Petitioners' characterization of it as such, and their inclusion in the appendix to their Petition of the District Court's opinion in *Branchburg*, appear to be an improper attempt to obtain from this Court an advisory opinion concerning another case which, as Petitioners admit, has not yet been decided by the Court of Appeals. Pet. at 1.

2. Petitioners mischaracterize in several respects New Jersey's statutory and regulatory provisions concerning the tuition paid by the sending school district to the receiving school district in a sending-receiving relationship. Specifically, Petitioners erroneously assert that, pursuant to New Jersey statutes and regulations, the tuition Lincoln Park pays to Boonton to educate Lincoln Park's high school students is: (1) "based upon its [Lincoln Park's] proportion of actual operating expenses" (Pèt. at 2); (2) "not negotiated" (*id.* at 4); (3) "imposed by N.J.S.A. 18A:38-19 and by N.J.A.C. 6:20-3.1" (*id.*); and (4) "required to [be] the majority of the operating costs of the [Boonton] high school" (*id.*). Petitioners also erroneously assert that "[a]ny increase in the cost per pupil for high school students is automatically, by regulation and statute, passed on to Lincoln Park taxpayers" (*id.*).

In fact, the governing statute provides in pertinent part that

> *the board of education of the receiving district shall determine a tuition rate* to be paid by the board of education of the sending district to an amount *not in excess of* the actual cost per

> pupil as determined under rules prescribed by the commissioner and approved by the state board. . . .

N.J.S.A. 18A:38-19 (emphasis added). The pertinent regulation merely defines in detail "actual cost." *See* N.J.A.C. 6A:23-3.1.[9] Accordingly, the tuition Lincoln Park pays Boonton is neither "imposed" by statute and regulation nor "automatic"; rather, it is determined by Boonton's Board of Education, subject to *a maximum* set by statute and regulation.

3. Finally, Petitioners' attempt to support their Petition on the grounds that the sending-receiving relationship between Boonton and Lincoln Park is involuntary (Pet. at 4-5) both misstates the record and contradicts Petitioners' express concessions before the Court of Appeals:

a. While Petitioners argued in the District Court that severance of the sending-receiving relationship would occasion substantial negative economic and educational consequences to Boonton and Lincoln Park, Petitioners' contentions that Boonton and the New Jersey Commissioner of Education "conceded" (i) that point (Pet. at 4) and (ii) that the Commissioner of Education was "unable" to identify any instance in which an application for severance of a sending-receiving relationship involving more than 25% of the student body of the receiving school was granted (Pet. at 4-5), though credited by the District Court, are flatly belied by the record. *See* Brief for Defendants-Appellants at 20-33 and portions of the Appendix referenced therein; Reply Brief for Defendants-Appellants at 9-16 and portions of the Appendix referenced therein.

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9. N.J.A.C. 6:20-3.1, cited by Petitioners (Pet. at 4) has nothing to do with tuition rates; in fact, that section number is "reserved."

b. Petitioners' attempt to support their Petition on the grounds that the sending-receiving relationship between Boonton and Lincoln Park is involuntary contradicts Petitioners' express concessions in the Court of Appeals. Before that Court, Lincoln Park affirmatively represented that it "has never advised that it wants to sever the relationship with Boonton. Nor would Lincoln Park be interested in severing the relationship with Boonton." Lincoln Park Brief on Appeal at 4. English, in turn, argued to that Court that whether the New Jersey Commissioner of Education would grant severance of the sending-receiving relationship between the two school districts is "not relevant or dispositive." Brief for Plaintiff/Appellee at 22-23.

CONCLUSION

For all of the foregoing reasons, Respondent The Board of Education of The Town of Boonton respectfully requests that the Petition be denied.

Respectfully submitted,

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